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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 759

VIRGINIA SKOVGAARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was written by the District Court for the District of Columbia. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 88–93) is reported at 202 F. 2d 363.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1953 (R. 94). The petition for a writ of certiorari was filed April 30, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether an applicant for National Service Life Insurance who has been denied a policy because of failure to present evidence satisfactory to the Administrator of Veterans' Affairs showing him to be in good health at the time of application may (a) sue the United States in the district court as if a contract of insurance had been entered into and breached, and (b) introduce evidence of good health never presented to the Administrator as support for the claim that a policy should have been issued.

STATUTES INVOLVED

Section 617 of the National Service Life Insurance Act of 1940, 54 Stat. 1014, as amended, 60 Stat. 788–789 (38 U. S. C. 817), provides:

> In the event of disagreement as to any claim arising under this Act, suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to the United States Government life (converted) insurance under the provisions of sections 19 and 500[1] of the World War Veterans' Act, 1924, as amended.

Section 602 (c) (2) of the National Service Life Insurance Act, as amended by Section 2 of

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[1] Section 500 of the World War Veterans' Act, 1924, 38 U. S. C. 551, restricts attorneys in presenting insurance claims but contains no authorization for suit.

the Act of August 1, 1946, 60 Stat. 781 (38 U. S. C. 802 (c) (2)), provides in pertinent part as follows:

> * * * any individual who has had active service between October 8, 1940, and September 2, 1945, both dates inclusive, shall be granted such insurance upon application therefor in writing and upon payment or authorization for deduction of premiums and evidence satisfactory to the Administrator showing such person to be in good health at the time of such application. In any case in which application for life or disability insurance or for reinstatement of such insurance is made prior to January 1, 1950, the Administrator shall not deny, for the purposes of this or any other section of this part, that the applicant is in good health because of any disability or disabilities, less than total in degree, resulting from or aggravated by such active service. * * *

Section 19 of the World War Veterans' Act, Act of June 7, 1924, 43 Stat. 612, as amended by Section 4 of the Act of July 3, 1930, 46 Stat. 992 (38 U. S. C. 445), provides in pertinent part as follows:

> In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the

> United States either in the district court of the United States for the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 5 and 6 of the Act entitled "An Act to provide for the bringing of suits against the Government of the United States," approved March 3, 1887, and section 10 thereof so far as applicable. * * *

Section 608 of the National Service Life Insurance Act, 54 Stat. 1012, as amended by Section 12 of the Act of August 1, 1946, 60 Stat. 788 (38 U. S. C. 808), provides:

> The Administrator, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, shall have power to make such rules and regulations, not inconsistent with the provisions of this Act, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising hereunder. All officers and employees of the Veterans' Administration shall perform such duties in connection with the administration of this Act as may be assigned to them by the Administrator. All official acts performed by such officers and employees designated therefor by the Administrator shall have the same force

and effect as though performed by the Administrator. Except in the event of suit as provided in section 617 hereof, or other appropriate court proceedings, all decisions rendered by the Administrator under the provisions of this Act, or regulations properly issued pursuant thereto, shall be final and conclusive on all questions of law or fact, and no other official of the United States, except a judge or judges of the United States courts, shall have jurisdiction to review any such decisions.

STATEMENT

Harvey Skovgaard served in the United States Navy from July 16, 1940, until April 28, 1945, when he was discharged because of chronic nephritis. While in the service he applied for and was granted $1,000 life insurance under the National Service Life Insurance Act of 1940. On January 29, 1947, he filed, under Section 602 (c) (2) of the National Service Life Insurance Act (*supra,* pp. 2–3), a written application for insurance in the additional sum of $9,000, the remainder of the maximum protection permitted, and tendered two months premium thereon.

On February 11, 1947, he entered a government hospital as an ambulatory patient. His application for additional insurance had not been formally acted upon when he died on May 6, 1947; it was administratively denied on June 25, 1947, on the ground that he was not in good health and

was totally disabled at the time the application was filed (R. 8, 42).

His widow, as beneficiary, filed suit against the United States to recover $9,000, alleging that her husband had automatically been granted the additional insurance. A motion to dismiss the complaint for want of consent to suit was denied (R. 5–6). A subsequent motion to strike the allegations of the complaint that Skovgaard was rated by the Veterans' Administration as less than totally disabled (for service connected disability) [2] was sustained by the same judge on the ground that such ratings were for compensation purposes and were unrelated to a National Service Life Insurance policy claim (R. 10–12), whereupon the complaint was amended to eliminate the allegations as to the ratings for compensation purposes (R. 12–14). After petitioner's evidence was in, the district court found that there was no contract of insurance under Section 602 (a) (2) in effect at the time of Skovgaard's death on which to base a claim and held that "An action against the United States under Section 817 [of Title 38, USC, *supra,* p. 2] is not a proceeding in which the Administrator's exercise

[2] Section 602 (c) (2) (*supra*, pp. 2–3), on which petitioner bases her claim, provides that the Administrator shall not deny that an applicant (who applies prior to January 1, 1950) is in good health "because of any disability or disabilities, less than total in degree, resulting from or aggravated by such active service."

of discretion in rejecting the application may be reviewed" (R. 86). The court directed a verdict for the Government, stating "I am passing on the record as a whole. I am saying, on the law and evidence before me, I do not believe that the plaintiff in this case is entitled to prevail" (R. 87).[3]

On appeal, the majority of the Court of Appeals, in an opinion by Judge Edgerton, held that the Government had consented to suit only as to claims under a contract of insurance and the district court was without jurisdiction of a claim, as here, not based on an existing contract of insurance. Judge Miller, dissenting, agreed that petitioner was not entitled to recover; but held that petitioner had failed to present evidence, satisfactory to the Administrator, that Skovgaard was in good health at the time of application and "the case turns on the sufficiency of proof submitted to the Administrator" (R. 93).

ARGUMENT

Petitioner asserts that the United States has consented to suit in the district court in cases in which the Administrator erroneously refused to issue a policy of insurance under Section 602 (c) (2). But petitioner cannot successfully

[3] Contrary to petitioner's statement (Pet. 6), the directed verdict did not overrule the decision on the jurisdictional motion; it specified that no contract was proved (R. 86–87) and was based on the law and evidence.

assail the interpretation of the Court of Appeals that the incorporation of the conditions and limitations of Section 19 of the World War Veterans' Act, 1924 (38 U. S. C. 445) (*supra*, pp. 3–4) in the consent to suit conferred by Section 617 of the N. S. L. I. Act (*supra*, p. 2) imported the earlier statute's limitation of suability to claims under an *existing contract of insurance*.[4] Other courts have reached the same conclusion. *Ginelli* v. *United States*, 94 F. Supp. 874 (D. Mass.); *Schilling* v. *United States*, 101 F. Supp. 525 (E. D. Mich.); cf. *Meadows* v. *United States*, 281 U. S. 271; *Burlingham* v. *United States*, 34 F. 2d 881 (C. A. 8); *Taft* v. *United States*, 127 F. 2d 876 (C. A. 2); *United States* v. *Fitch*, 185 F. 2d

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[4] The repeal by implication said to have been effected by the August 1, 1946, amendment, changing the terms of Section 617 of the N. S. L. I. Act (Pet. 8–9), has no foundation. To permit suit on an insurance policy implied in law would require apt words.

Petitioner herself (Pet. 8–9) proves that the 1946 amendment to Section 617 (*supra*, p. 2), changing "claim" to "any claim", was to reflect the change whereby questions of waiver or non-waiver of premiums under a policy were no longer to be withheld from judicial review. The committee reports stress the congressional belief that judicial review should be authorized when contractual rights and benefits under insurance policies are denied. S. Rep. 1705, 79th Cong., 2d sess., pp. 9, 10; H. Rep. 2002, 79th Cong., 2d sess., pp. 10, 11. There was no concern with judicial review in the absence of a contractual relationship. Cf. *United States* v. *Zazove*, 334 U. S. 602, 611–12. In the face of this legislative history, expressions as to the effect of "any" in other statutory contexts (see *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 548) are not persuasive.

471 (C. A. 10); *Mitchell* v. *United States,* 111 F. Supp. 104 (D. N. J.). *Contra: Unger* v. *United States,* 79 F. Supp. 281 (E. D. Ill.); compare *Gamez* v. *United States,* 95 F. Supp. 656, 660 (S. D. Texas) (under Section 602 (c) (3)). Petitioner in suing on a refusal to issue a policy does not claim either on an insurance policy in effect or on one agreed to be issued. Cf. *United States* v. *Leahy,* 148 F. 2d 462, 466 (C. A. 3). She has not proved or attempted to prove that an insurance policy was issued or that the Administrator was satisfied by what the application showed. The district court was, therefore, without jurisdiction of her suit.

But even if consent to suit on a nonconsensual contract might be implied where the Administrator should have been satisfied that applicant was in good health, petitioner still would have no prospect of success in this suit, since recovery would have to be denied on other adequate grounds. Although the Administrator is admonished not to deny the good health of an applicant with disabilities less than total in degree, resulting from or aggravated by active service between October 8, 1940, and September 2, 1945, the Act clearly requires that the evidence satisfy him of applicant's good health at the time of the application. Cf. *Tagg Bros.* v. *United States,* 280 U. S. 420, 444; *Bayly* v. *United States,* 99 C. Cls. 598, 605–6; *Lanier* v. *New York Life Ins. Co.,* 88 F. 2d 196, 198–9 (C. A. 5), certiorari denied,

301 U. S. 693. It is not enough that a *jury* or a *court* subsequently be satisfied that the applicant was not totally disabled.[5] If reviewable at all, the Administrator's denial must be reviewed in the light of the evidence presented to him. His discretion cannot be upset on the strength of evidence he never saw.

Petitioner does not attempt to show that the Administrator should have been satisfied on the basis of Skovgaard's application and the materials presented with the application.[6] Instead, she

[5] *Berry* v. *United States*, 312 U. S. 450, involved the question whether there was sufficient evidence to sustain the jury verdict that the insured claimant had become totally and permanently disabled while his war risk insurance was in effect. No provision requiring that the Administrator be satisfied of the insured's disability was involved.

[6] The complaint does not allege arbitrary or capricious action, or bad faith (R. 12–13). Cf. *Dismuke* v. *United States*, 297 U. S. 167, 172–3; *Byrne* v. *United States*, 97 C. Cls. 412, 423; 3 Williston, *Contracts*, Rev. Ed. 1936, § 675A. Petitioner's counsel expressly denied that any abuse of the Administrator's discretion had to be shown (R. 81–82). He took the position that the Administrator's denial was without significance. "You have to go to him first to get your disagreement; and if he denies the claim, you have the right to go into court * * *. This amendment was put in so that the thing could be cut wide-open, because the Act states, under 'any claim'" (R. 82). Petitioner reads out of the statute the requirements that suit be on a policy of insurance and that good health be proved to the satisfaction of the Administrator by evidence accompanying the application. She reads into the Act that she is entitled to go outside the application, to rely on ratings for other purposes, to have a trial *de novo* (R. 38–40), and to require the Government to prove that a rating of total disability was made in the lifetime of the applicant.

relied in the courts below on a rating for compensation purposes[7] and now relies on what a jury could find therefrom. It is beside the point to insist that during the insured's lifetime no rating of total disability had been made (Pet. 5, R. 36–37). Unless petitioner is to be relieved from proving conditions precedent to insurance liability, she must at least show that the applicant presented to the Administrator evidence showing he was in good health at the time of his application.[8] The only proof of Skovgaard's good health which petitioner introduced at the trial was that "he filed the report of a medical examination

[7] The compensation ratings are made under other provisions (38 U. S. C. 471, 477). They were based on other and different evidence relating to health at earlier times, and were appraised by different standards. It has long been settled that such ratings are inadmissible to prove the extent of disability for insurance purposes. *Demeter* v. *United States*, 66 F. 2d 188 (C. A. D. C.); *United States* v. *Thomas*, 53 F. 2d 192, 195 (C. A. 4); *Lockett* v. *United States*, 86 F. 2d 1 (C. A. 5); *Magenton* v. *United States*, 75 F. 2d 410, 412 (C. A. 8); *United States* v. *Golden*, 34 F. 2d 367, 369–70 (C. A. 10); *Rose* v. *United States*, 70 F. 2d 68 (C. A. 10); *Guihan* v. *United States*, 110 F. Supp. 738 (E. D. N. Y.).

[8] The ratings for compensation purposes may have been too unfavorable to Skovgaard by taking his disabilities too lightly. If they were, that is hardly a reason for substituting insurance benefits and certainly no basis for an estoppel against the United States. *Wilber National Bank* v. *United States*, 294 U. S. 120; *Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380; *James* v. *United States*, 185 F. 2d 115 (C. A. 4); *McDaniel* v. *United States*, 196 F. 2d 291 (C. A. 5); *United States* v. *Fitch*, 185 F. 2d 471 (C. A. 10). Skovgaard tried to obtain total disability (R. 72).

made January 28, 1947, which disclosed chronic nephritis, albuminuria plus 4, a heart murmur and arteriosclerosis, and which contained no expression of opinion by the examiner as to whether the applicant was then partially or wholly disabled by his ailments" (R. 71–72, 93). *United States* v. *Spaulding,* 293 U. S. 498, cited at Pet. 11, is no authority for the proposition that chronic nephritis, standing by itself, may never disable, and the applicant did not present any other evidence showing that he was not totally disabled.

In the circumstances of this case the only question is whether the complaint should have been dismissed for lack of jurisdiction, or for failure to state a claim upon which relief might be granted, or whether judgment should have been entered for the Government for failure of proof. A different decision from that of the majority below on the jurisdictional issue would not affect the outcome.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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